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Causing Death by Faultless Driving

R v Williams [2010] EWCA Crim 2552

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The appellant (W) bought a car which he had been driving regularly for up to three months although he had no driving licence or insurance. Early one evening in February 2009, W was driving in a 30 mph zone on a dual carriageway in the centre of Swansea. A pedestrian crossed the southbound carriageway and the central reservation and stepped out in front of W's car. He was hit and died from his injuries the next day. It was clear from the evidence of witnesses that the accident was unavoidable.

W was convicted at the Crown Court at Swansea of causing death by driving without insurance and without a licence contrary to s. 3ZB of the Road Traffic Act 1988 (as inserted by the Road Safety Act 2006). He was sentenced to nine months' imprisonment and disqualified from driving for two years.

W appealed against conviction on the ground that the offence could not be committed without some fault or blameworthy conduct on the part of the appellant: 'cause' must be construed as importing 'fault'. Alternatively, if that construction of 'cause' was incorrect, it should be construed as requiring the Crown to prove that the appellant's driving was a substantial or major cause of the death of the deceased.

Held, dismissing the appeal, the wording of the provision is clear; as a matter of simple statutory construction, fault is not required. At the hearing, an appeal against sentence was allowed. Although a custodial sentence was appropriate, a sentence of 24 weeks was substituted as, given all the circumstances, the original term was too long.

Commentary

Section 21 of the Road Safety Act 2006 amended the Road Traffic Act 1988 by introducing a controversial new offence in s. 3ZB:

A person is guilty of an offence under this section if he causes the death of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is committing an offence under--

- (a) Section 87(1) of this Act (driving otherwise than in accordance with a licence);

(b) Section 103(1) of this Act (driving whilst disqualified), or

(c) Section 143 of this Act (using a motor vehicle while uninsured or unsecured against third party risks).

At trial, the Recorder of Swansea had told the jury that they had to be sure that the defendant's driving of his car was a cause of the pedestrian's death. The jury had then asked whether, if they considered that the deceased's stepping into the road was the principal, main or major cause, should that influence their consideration of the defendant's driving as also being a cause? The judge answered that the deceased's action in stepping into the road would not exclude another true cause. On appeal, the Crown accepted that there was a principle that the result of a defendant's act normally had to be attributable to a culpable or blameworthy act. However, for the purposes of s. 3ZB, Parliament must have intended to dispense with this requirement. The Court of Appeal first considered whether it was Parliament's intention to depart from this general principle in enacting this offence. The court noted (at [20]) that the Road Traffic Act 1988 (as amended) contained other provisions relating to causing death by driving: causing death by dangerous driving (s. 1), causing death by careless driving when under the influence of drink or drugs (s. 3A), and causing death by careless, or inconsiderate, driving (s. 2B). Furthermore, in relation to the latter offence, s. 3ZA defines 'careless and inconsiderate driving' as follows:

(2) A person is to be regarded as driving without due care and attention if (and only if) the way in which he drives falls below what would be expected of a competent or careful driver ...

(4) A person is to be regarded as driving without reasonable consideration for other persons only if those persons are inconvenienced by his driving.

The fact that this offence of careless and inconsiderate driving specifies a low level of fault weighed heavily with the Court of Appeal which concluded (at [19]) that if the offence under s. 3ZB 'were to be interpreted to require any blameworthy conduct, bearing in mind the very wide scope of the offence of causing death by careless and inconsiderate driving, it is difficult to see what purpose the offence could have ... To hold that blameworthy conduct was required would be to re-write s. 3ZB'. Thomas LJ applied the approach of the Court of Appeal in *R v Marsh* [1997] 1 Cr App R 67, where the court had held that fault in relation to injury arising or damage caused was not required on a charge of aggravated vehicle-taking under s. 12(A)(1) of the Theft Act 1968.

The second issue for the court in the present case was whether it was sufficient for the appellant's driving to be a cause of the death. The trial judge had directed the jury that if they found that the appellant's driving was a cause which was not minimal, then he was guilty of the offence. Defence counsel's second argument was that the judge had erred; Parliament must have intended that the driving had to be a major or substantial cause. Thomas LJ (at [22]) applied the approach taken by the Court of Appeal in *R v Hennigan* (1971) 55 Cr App R 262, a case of causing death by dangerous driving. With regard to the issue of causation, Lord Parker CJ had observed in that case that '[t]he Court would like to emphasise that there is nothing in the statute which requires the manner of the driving to be a substantial cause, or a major cause, or any other description of cause, of the accident. So long as the dangerous driving is a cause and something more than *de minimis*, the statute operates'.

Defence counsel's submission that the appellant's conduct did not 'cause' the death in the ordinary sense of the word, the absence of a licence and insurance playing no part in the occurrence of the accident, was unsuccessful. The court considered the general explanation of causation provided in Chapter 5(9), para. 3 of the *Crown Court Bench Book*, published by the Judicial Studies Board in March 2010. This referred to proposals made in 2002 by a Law Commission Working Party on codifying causation; the Commission's final report was not published, but the Court of Appeal had the benefit of the draft report from 2003 which was a

commentary on elements of the draft Criminal Code, annexed to the Law Commission's Report, *A Criminal Code for England and Wales*, Law Com. Report No. 177 (1989). The draft Criminal Code had suggested that the definition of causation for a result crime included doing 'an act which makes a more than negligible contribution to its occurrence' at 17(1). This definition had sparked debate with the effect that the Law Commission decided to look again at the issue of a definition of 'causation', and its 2003 draft report proposed replacing the Code's 'more than negligible' with 'significant', after reviewing case law.

The Court of Appeal then reviewed authorities referred to in the Law Commission's 2003 draft report (at [31]), concluding that 'it is not always possible to deal with the issue by the use of "significant" or "substantial"' (at [32]), as the decisions in *R v Skelton* [1993] Crim LR 635, *R v Barnes* [2008] EWCA Crim 2726 and *R v Girdler* [2009] EWCA Crim 2666, all death by dangerous driving cases, illustrate. Thomas LJ approved the observation of Lord Hoffmann when considering how 'common-sense notions' of causation have treated the intervention of third parties in *Environment Agency (formerly National Rivers Authority) Respondent v Empress Car Co. (Abertillery) Ltd* [1999] 2 AC 22 at 29: '... one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule'.

The Court of Appeal concluded in the present case that as the meaning of 'cause' in death by dangerous driving was decided by *R v Hennigan* (above), Parliament could not have intended any different interpretation for s. 3ZB (at [33]). Thomas LJ stated (at [34]):

in the context of the other offences where death results from driving ... it is difficult to conceive of any other intention of Parliament that if a person drove unlicensed or uninsured, he would be liable for death that was caused by his driving however much the victim might be at fault; it was therefore sufficient that the cause was not negligible. It may be a harsh and punitive measure with an evident deterrent element, but it is difficult to see how anything else can have been intended.

The court rejected including any reference to 'significant' or 'substantial' by the judge to a jury in a case such as this as the terms could be easily misunderstood (at [36]). Given the academic criticism of this offence on the ground that it is objectionable in principle, it is important that a jury clearly understands that what is required is that a cause was more than minute or negligible.